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IN THE

Supreme Court of the United States

Term, 19 .

No. 419.

MARIE DuBAN, Individually, and as Executrix of the Estate of Alfred A. DuBan, Deceased, and HARRY J. ALKER, JR.,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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Harry J. Alker, Jr.,
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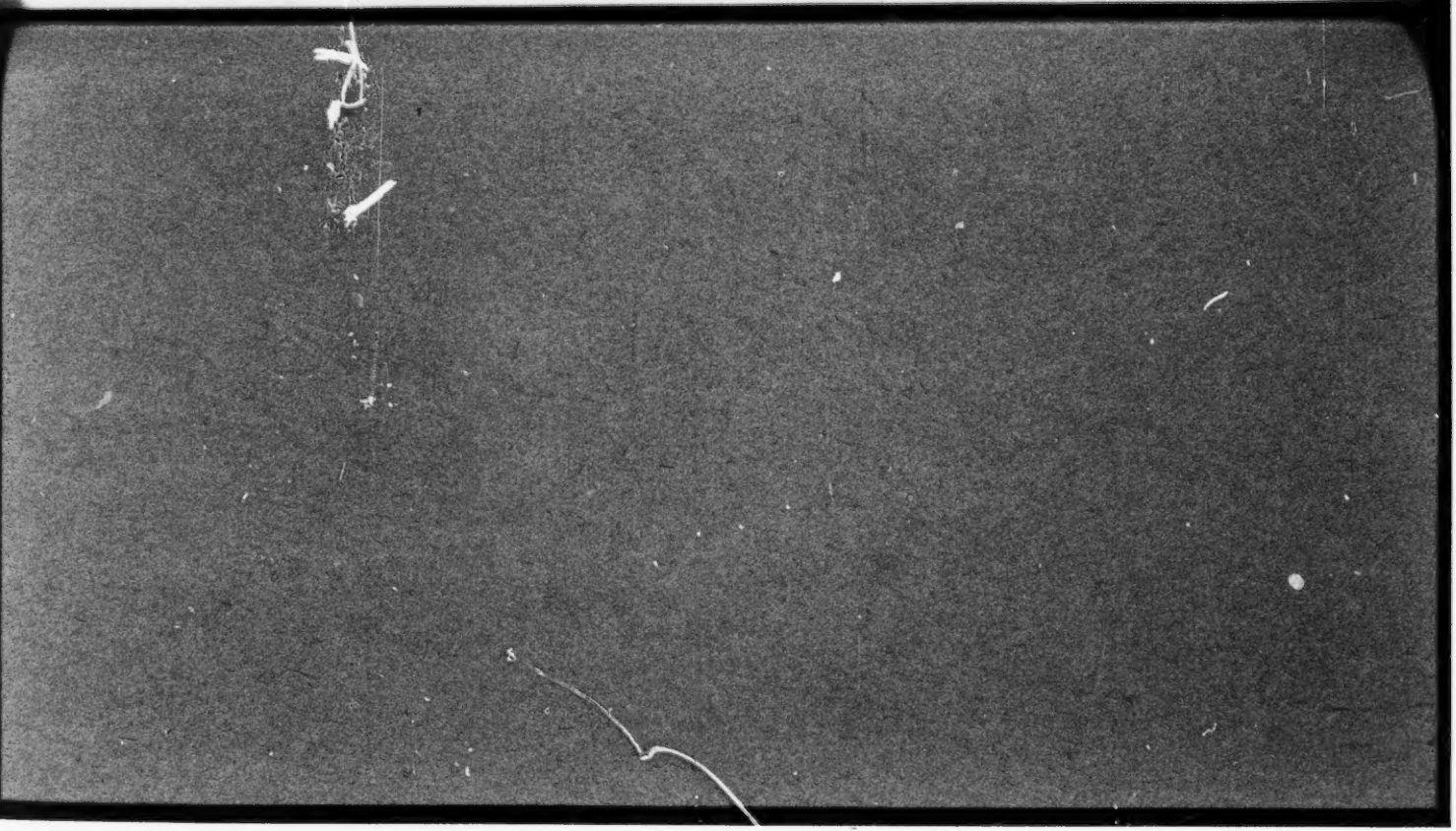

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Supreme Court of the United States.

Term, 19 .

No. .

MAMIE DuBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED, AND HARRY J. ALKER, JR.,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Mamie DuBan, Individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, and Harry J. Alker, Jr., respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit, and respectfully show:

Summary Statement of Matters Involved.

This is an equitable action by the Federal Deposit Insurance Corporation to recover from the petitioners an

alleged deficiency on a certain demand note dated December 11, 1936, in the sum of $564,367.51, after selling to itself most of the collateral with the note (which note was in renewal of two prior demand notes dated May 26, 1931, in the sum of $242,150 and $350,000); there was an oral agreement for valuable consideration moving from a third party deferring the time of payment of the note but the Court found against the petitioners because of indefiniteness as to time of deferment—the Trial Court having refused to receive petitioners' evidence which would have fixed such time. THE TRIAL COURT SPECIFICALLY, HOWEVER, FOUND THERE WAS NO FRAUD. Judgment was entered against the petitioners. A motion for new trial was made and refused. An appeal, assigning various errors of the Chancellor, was taken to the United States Court of Appeals for the Third Circuit, which (without going into the errors assigned), affirmed the judgment as a matter of law, holding the case was controlled by the decision in D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation, 315 U. S. 447 (WHICH WAS A GROSS FRAUD CASE), and section 12B (s) of the Federal Reserve Act, 12 U. S. C. A., section 264 (s). A petition for certiorari was refused by this Court, 327 U. S. 799.

The motion for new trial in the lower Court was thereafter renewed because of after-discovered evidence; and then an application was filed to the then Circuit Court of Appeals for permission on the part of the District Court to hear the same. The application was refused.

The certiorari was refused by this Court, 334 U. S. 827.

The motion for new trial was renewed on March 1, 1949, because on June 12, 1948, Section (s) of Section 12B of the Federal Reserve Act upon which the Court of Appeals based its original decision (151 F. 2d 907) was repealed by Congress. This section of the Federal Reserve Act was also one of the bases for decision in *D'Oench, Duhme & Co. Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447. At the same time the said provision

was in substantially the same form re-enacted as a part of the Criminal Code, thus showing Congress' intent that the provision should apply only to Criminal and Fraud cases.

On March 3, 1949, after consideration of the entire record in the case, the lower Court granted a new trial. This was allowed by Welsh, J., who had conducted the trial.

The Federal Deposit Insurance Corporation then sought a writ of prohibition from the Court of Appeals. An appeal by the Federal Deposit Insurance Corporation was also filed about the same time.

On May 9, 1949, the appeal filed by the Federal Deposit Insurance Corporation was dismissed.

On May 18, 1949, the Court of Appeals dismissed the writ of prohibition. The lower Court (Kirkpatrick, C. J.—not Welsh, J., the trial judge) at the same time entered an order dismissing "defendants' motion for new trial dated October 29, 1946, renewal of motion for new trial, supplemental motion for new trial and additional reason, and all motions of defendants in the nature of motions for new trial or a bill of review."

As heretofore stated the order was made by Kirkpatrick, C. J., and not the trial judge, Welsh, J., who had granted the new trial and who was then out of the country. The order so made did not vacate Judge Welsh's action in granting a new trial.

The defendants appealed on May 25, 1949, from said order of Judge Kirkpatrick.

While this appeal was pending the Federal Deposit Insurance Corporation presented on October 26, 1949, a motion for revival of the judgment. On November 2, 1949, the Court entered an order directing the Clerk of the Court to note upon the judgment index that a motion for revival of judgment had been filed. On December 10, 1949, defendant Alker appealed from that order.

The Court of Appeals on July 25, 1950, affirmed the order entered by Judge Kirkpatrick on May 9, 1949, and

also affirmed the order of the District Court of November 2, 1949, as to the revival of judgment.

Petitions for rehearing were duly filed by both sides. These were denied on August 29, 1950.

This appeal was then taken by the defendants.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 1254 of the United States Code, Judiciary and Judicial Procedure, as enacted by the Act of Congress approved June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. A. 1254.

Questions Presented.

(1) Where a trial judge, after hearing, has entered an order granting a new trial, may another judge of coordinate jurisdiction vacate the order of the trial judge while he is temporarily absent from the country, there being nothing in the record of the trial court showing the consent of the trial judge thereto?

(2) Where a trial judge, after hearing, has entered an order granting a new trial, does a decree of a judge of coordinate jurisdiction dismissing "all defendants' motions in the nature of motions for a new trial, or a bill of review" and not specifically vacating said action of the trial judge (who is then absent from the country and *there being nothing in the record of the trial court indicating the consent of the trial judge to said order*) vacate or affect an order previously entered by the trial judge granting a new trial?

(3) Is a Court of Appeals permitted to base its decision on matters outside the record in the District Court from which the appeal is specifically taken?

(4) After a notice of appeal is filed may a District Court enter any kind of an order in the same case?

Reasons Relied on for Allowance of the Writ.

(1) The decision of the Court of Appeals for the Third Circuit affirming the order of May 9, 1949, of the District Court is in direct conflict with the decisions of the Court of Appeals for other circuits upon the same important matter of general law.

(2) The decision of the Court of Appeals for the Third Circuit affirming the order of May 9, 1949, of the District Court is in direct conflict with a prior decision by the same Court of Appeals upon the same important matter of general law.

(3) The Court of Appeals did not base its decision on the record of the District Court in the matter but relied on matters outside the said record.

(4) The decision of the Court of Appeals for the Third Circuit in affirming the order of November 2, 1949, is in direct conflict with the decisions of other Courts of Appeals upon the same important matter of general law.

Prayer for Writ.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and the proceedings of the said United States Court of Appeals in the case at bar, and entitled on its Docket as Nos. 10,002 and 10,120, and Mamie DuBan, Individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, and Harry J. Alker, Jr., Appellants, v. Federal Deposit Insurance Corporation, Appellee, to the end that these causes may be reviewed and determined by this Court as provided for by the Statutes of the United States; that the orders of the said Court may be reversed; and that the judgments

herein of the United States Court of Appeals for the Third Circuit may be reversed by this Court, and for such further relief as this Court may deem proper.

And your petitioners will, ever pray.

MAMIE DuBAN
Individually and as Executrix
of the Estate of Alfred A.
DuBan, Deceased,
HARRY J. ALKER, JR.,
Petitioners.

A. D. Bruce
Edwin Hall II
Harry J. Alker Jr.
Counsel for Petitioners

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The original opinion of the United States Court of Appeals for the Third Circuit is reported in 151 F. (2d) 907.

The opinion of the District Court is not reported but is set forth in the record at pages 537a-543a.

Certiorari was refused by the Supreme Court in 327 U. S. 799.

Several applications to the Court of Appeals in the nature of a bill of review were denied in 163 F. (2d) 123, 164 F. (2d) 469 and 169 F. (2d) 336.

Certiorari was refused as to this in 334 U. S. 827.

The opinion of the Court of Appeals for the Third Circuit to which certiorari is now sought is reported in 183 F. (2d) 429.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 1254 of the United States Code, Judiciary and Judicial Procedure, as enacted by the Act of Congress approved June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. A. 1254.

Petitions for rehearing filed by both sides were denied August 29, 1950.

Statement of the Case.

The plaintiff in this case is Federal Deposit Insurance Corporation and the defendants are Mamie DuBan, Individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, Harry J. Alker, Jr., and National Dairy Products Corporation.

This was an action in equity in the District Court whereby the plaintiff sought a money judgment against Alker and a decree directing National Dairy Products Corporation to transfer certain shares of its common stock to the name of the plaintiff. The case was heard by a Chancellor without a jury and he rendered an opinion in favor of the plaintiff, because he felt the contract involved was indefinite as to time. Had he not refused to receive testimony on this point offered by defendants, he could not have so found.

The defendant Alker had the second largest loan at the Integrity Trust Company. As collateral for this loan there were pledged various securities. When the value of the securities dropped sharply in 1931, Alker was unable to put up additional collateral, and DuBan, a friend of Alker, agreed to put up additional collateral provided the bank would place a term policy on the life of Alker at Alker's expense and would defer calling the loan for the life of the policy; Alker to pay the insurance premiums and the interest on the loan and also to pay the bank, when received, certain fees less expenses which had been earned by Alker but not been paid. This was an oral agreement entered into in 1931. Alker paid the interest regularly and the premiums on the insurance, which premiums amounted to about $5,000 a year. In 1936, as the original notes were then five years old, the bank examiner requested a new note (Appendix 216a), which Alker executed, and inasmuch as general financial conditions had not improved, the bank extended the agreement as to deferment to ten years placing new term insurance on Alker's life for ten years to run until October, 1946, Alker to continue to pay the premiums and interest and any of the said fees as received that remained unpaid.

The original notes bore an endorsement on the back referring to the original agreement—to wit, "For additional collateral agreement with Mr. Alker, and A. A. DuBan see W. K. H." (W. K. H. refers to Walter K.

Hardt, President of the Integrity Trust Company). In preparing the renewal note of 1936 the bank placed a special endorsement thereon for the purpose of carrying forward the agreement covering the first notes. This endorsement was as follows: "This note is given in substitution and continuance of my demand notes in the original amount of $350,000 dated May 26, 1931, and $242,150 reduced by payments on account to $214,367.51 dated May 26, 1931" (Appendix 490a). Alker continued to pay the premiums and the interest and any of the assigned fees as he received them.

In 1940 the Integrity Trust Company ceased to do business. Several days prior to the closing of the trust company, the Federal Deposit Insurance Corporation made a loan to it claiming at the trial that it took as collateral, among other things, the Alker note. It developed later it took it as collateral for its own and loans by other banks and trust companies. A few days later the Federal Deposit Insurance Corporation's representative had Alker call upon him at the Integrity Trust Company and review the agreement which covered Alker's note. A day or two later the said representative had Mr. William F. Fischer, one of the directors of the Integrity Trust Company and member of the Executive Committee, who was familiar with the agreement and its approval by the trust company, call upon him and review the same.

The Federal Deposit Insurance Corporation continued to honor the agreement, took the interest and checked on Alker's payment of the insurance premiums regularly for almost three years. In January, 1943, the Federal Deposit Insurance Corporation, when there was no default on Alker's or DuBan's part (Appendix 211a), sold out the collateral to itself at a private sale. It then instituted this proceeding against National Dairy Products Corporation to compel the transfer of DuBan's stock (National Dairy knowing of the agreement and therefore refusing to transfer the stock) and establish against Alker a deficiency.

The case was heard by Judge Welsh acting as a Chancellor without a jury. At the trial the plaintiff proceeded on the theory it was a holder in due course of the Alker note and that it owned it, claiming it relied upon the federal and state bank examiners for its information concerning the loan. (The Federal Deposit Insurance Corporation had under the law the right to employ its own examiners—which it apparently elected not to do). Alker set up the defense of the oral agreement adhered to by the Integrity Trust Company for nine years and which had been honored by the plaintiff for almost three years. A judgment was entered in favor of the plaintiff because, as heretofore stated, the Court felt the agreement was indefinite as to time. The defendants offered to prove the definiteness of time by the testimony of the insurance representative retained by the bank to place the term insurance (Appendix 461a to 464a). However, the Court refused to receive his testimony on the ground that it had already had sufficient testimony. If this testimony of the insurance representative had been received, the Court would have had the facts as to time from an independent witness, and the Court's finding could only have been for the defendants.

The Chancellor expressly found there was no fraud in this case.

A motion for new trial was duly filed and refused.

An appeal was taken to Court of Appeals, which sustained the judgment in favor of the plaintiff on the theory that the agreement that Alker and DuBan had with the Integrity Trust Company was a "secret" agreement as a matter of law, citing as its authority *Federal Deposit Insurance Corporation v. D'Oench, Duhme & Co. Inc.*, 315 U. S. 447, and sub-section S of Section 264 of the Federal Reserve Act, Title 12 U. S. C. A., and held the Federal Deposit Insurance Corporation was therefore not bound by it.

Certiorari was refused by the Supreme Court.

On October 29, 1946, the defendants filed with the trial judge a motion for reconsideration of their motions for new trial. Depositions were taken in connection therewith. This motion was filed on the basis of certain after-discovered evidence of which the defendant Alker was not aware at the time of the trial, including that of a witness who had been overseas in war service during the trial and had just returned and become available; and that of another witness, who had been a state bank examiner and had at the closing of the Integrity Trust Company and for several consecutive years immediately prior thereto examined its books and gave his deposition to the effect that the officers of the bank had informed the examiners on each of those occasions of the agreement and the circumstances surrounding the Alker loan.

At that time Judge Welsh felt that under the law and rules of procedure as they then existed it was necessary to have the Appellate Court give him leave to consider this motion for a new trial. An application was made to the Circuit Court, which was refused. After several petitions for rehearing in the Circuit Court for leave to the District Court to hear the motions for new trial, all of which were denied, a certiorari was filed with the Supreme Court and this was refused.

On July 28, 1948, the plaintiff Federal Deposit Insurance Corporation moved in the District Court to have the Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Integrity Trust Company, substituted as party plaintiff in the place and stead of the Integrity Trust Company.

About the same time, the Federal Deposit Insurance Corporation also reported in the public press that it had repaid in full the various local banks which had also made loans to the Integrity Trust Company in an effort to help it out and had sufficient in hand to more than repay itself—disclosing for the first time that it had taken the collateral

(including the Alker note and the collateral thereon) as security for said local banks and itself, and that it had in fact acted as liquidator for all. This was contrary to the testimony given by the Federal Deposit Insurance Corporation at the trial, and was important, as Mr. Fischer had testified that the representatives of the said banks were on the executive board of the Integrity Trust Company and had approved the Alker and DuBan agreement not only when it was made, but also a number of times later when the executive board was reviewing the notes held by the bank. The Federal Deposit Insurance Corporation was, therefore, bound by knowledge of the said banks and trust companies.

In the meantime in the summer of 1948, Congress had amended the law upon which the Circuit Court had based its original finding that the agreement was a "secret" agreement. Sub-section S of Section 264 of the Federal Reserve Act, 12 U. S. C. A., was taken out of the Federal Reserve Act and in similar language was placed in the United States Code under Crimes and Criminal Procedure, Title 18, Section 1007. *This was specifically done so that Congress' intention that the said Section should only apply to a fraud case would be clear,* and was brought about by the Circuit Court's action in the DuBan-Alker case.

Congress also amended the Rules of Civil Procedure, particularly Rule 60B dealing with relief from judgments or orders, greatly broadening and enlarging the powers of the Trial Judge in those respects. The appellants thereupon renewed their motion for a new trial before Judge Welsh, and, in view of the Congressional action aforesaid and after careful investigation by the Court of the change in the law and the reason therefor and a restudy of the whole record, Judge Welsh granted a new trial on March 3, 1949.

On April 1, 1949, the plaintiff, F. D. I. C. appealed from Judge Welsh's Order of March 3, 1949 (Appendix P. 650a).

On May 9, 1949, the plaintiff F. D. I. C. filed a number of motions before Judge Kirkpatrick (not Judge Welsh) in the District Court. Among them was a motion to dismiss its appeal (Appendix 651a), which was granted. Another was a motion to deny all motions by the defendant for a new trial. The motion for a new trial had already been granted by Judge Welsh, who was in Europe. The motion by the F. D. I. C. to deny all motions by the defendants for a new trial, although actually no motion for a new trial was before the Court, was granted by Judge Kirkpatrick—not Judge Welsh, the Trial Judge, who had already granted the new trial. The decree contained no provision vacating Judge Welsh's action.

On May 25, 1949 the Defendants appealed from Judge Kirkpatrick's order of May 9, 1949. While this appeal was pending the F. D. I. C. on October 26, 1949 presented a motion for revival of judgment. On November 2, 1949, after hearing, the Court entered an order directing the Clerk of the Court to note upon the Judgment index that a motion for revival of judgment had been filed. On December 10, 1949, an appeal was taken from that order.

The Court of Appeals on July 25, 1950 affirmed both the orders of the District Court dated May 9, 1949 and November 2, 1949. Petitions for re-hearing were duly filed by both sides. These were denied on August 29, 1950.

ARGUMENT.

1. Where a trial Judge, after hearing, has entered an order granting a new trial, may another Judge of coordinate jurisdiction vacate the order of the trial Judge while he is temporarily absent from the country, there being nothing in the record of the trial court showing the consent of the trial Judge thereto?

The order of March 3, 1949, granting the new trial was allowed by Judge Welsh who had conducted the trial. The Order of May 9, 1949, was allowed by Judge Kirkpatrick. Judge Kirkpatrick's Order reads as follows:

> "And Now, to wit, this 9th day of May, 1949, the Defendants' Motion for New Trial dated October 29, 1946, Defendants' Renewal of Motion for New Trial dated August 25, 1948, Defendants' Supplemental Motion for New Trial dated November 1, 1948, the additional reason filed March 1, 1949, and all defendants' motions in the nature of Motions for a New Trial, or a bill of review; are hereby dismissed."

The record in this matter shows that Judge Kirkpatrick is a Judge of co-ordinate jurisdiction with Judge Welsh, both being Judges of the District Court for the Eastern District of Pennsylvania. That being so, it is evident that Judge Kirkpatrick's Order of May 9, 1949, is a violation of the established principle of law in the Federal Courts that a Judge should not reconsider matters of record that have been ruled upon by a Judge of a coordinate jurisdiction in the same case. This principle was established by Mr. Justice Miller of the Supreme Court in *Appleton v. Smith,* 1 Fed. 1075 Fed. Case No. 498 in 1870. It has been strictly adhered to by many of the Courts in the various Circuits:

Commercial Union of America, Inc. v. Angelo-South American Bank, 10 F. 2d 937, 948—(2nd Circuit).

Cherry et al. v. Howell et al., 66 F. 2d 713 (2nd Circuit);

Shreve v. Cheesman, 69 F. 785, 790 (8th Circuit).

This same principle was cited with approval by this very Court of Appeals for the Third Circuit to which certiorari is now sought in *Price v. Greenway,* 167 F. 2d 196, 199 as recently as 1948.

The action of the Court of Appeals for the Third Circuit in affirming the Order of May 9, 1949, is not only in conflict with decisions within its own Circuit, but is also in conflict with decisions of the Second and Eighth Circuits. It is submitted therefore that because of this conflict the petition for certiorari should be granted so that this basic principle of law may be clarified.

2. Where the Trial Judge, after hearing, has entered an order granting a new trial, does a decree of a judge of coordinate jurisdiction dismissing "all defendants motions in the nature of motions for a new trial, or a Bill of Review" and not specifically vacating said action of the Trial Judge (who is then absent from the country and there being nothing in the record of the Trial Court indicating the consent of the Trial Judge to said Order) vacate or affect an Order previously entered by the Trial Judge granting a new trial.

When Judge Kirkpatrick entered his Order of May 9, 1949, there was no motion pending before the District Court for a new trial. The new trial had already been granted. The various motions were no longer in existence as they had culminated in the order granting a new trial. This order did not vacate Judge Welsh's action. There was, therefore, no motion before the District Court on which Judge Kirkpatrick could act. Furthermore the F. D. I. C. knew that no motion was pending for a new trial because on April 1, 1949, it took an appeal from Judge Welsh's Order granting the new trial, thereby recognizing the validity of the said Order.

Counsel for the F. D. I. C. admitted at the argument that he had prepared the Order signed by Judge Kirkpatrick. It has long been a rule of law that in interpreting a legal instrument it must be construed against the party

preparing it. This Order of Judge Kirkpatrick's makes no mention of the Order granting a new trial on March 3, 1949. How an order can be said to vacate another order when the second order does not state it is vacating anything is difficult to conceive? Language which does not appear in an order should not be, and cannot be read into it. It is clear therefore that the Court of Appeals erred in sustaining this second order of the District Court inasmuch as it does not state it is vacating any order. The order of May 9, 1949 could not be dismissed without being first vacated or opened. Furthermore the second order does not refer to the first one.

3. Is a Court of Appeals permitted to base its decision on matters outside of the record of the case in the District Court?

When the appeal was taken to the Court of Appeals your petitioners printed the entire record. In order that your Honorable Court may pass upon this question, the entire record of the District Court is now before this Court. This has been done because the Court of Appeals has based its affirmance of Judge Kirkpatrick's Order of May 9, 1949, upon matters outside the record.

In its opinion and discussion the Court of Appeals refers to a certain rule to show cause for a writ of prohibition. The Court also refers to an answer filed therein in the Court of Appeals by Judge Welsh. The final order in the mandamus proceeding was entered on May 18, 1949. That proceeding occurred entirely in the Court of Appeals, and the record thereof was only in the Court of Appeals. The number in the Court of Appeals was 8805, an entirely different Appellate Court number from the present numbers. An examination of the record and docket entries in the District Court shows that only a certified copy of the Order of the Court of Appeals granting the rule to show cause was filed with the District Court on March 30, 1949. The record contains no copy of the Answer as filed by Judge Welsh in the Court of Appeals to the rule to show

cause, nor any copy of the Order made by the Court of Appeals on May 18, 1949, thereon. The rule to show cause was dismissed by the Court of Appeals as being moot.

The Court of Appeals by basing its opinion on the answer filed in the Court of Appeals' proceedings for the rule to show cause, referred and read into the appeal in this case something that was not a part of the record of the District Court which it was reviewing. To so do was contrary to the law as laid down by the Court of Appeals of other Circuits.

See *Drake v. General Finance Corporation of Louisiana, Inc.*, 119 F. 2d 589, in which the Fifth Circuit laid down the basic principle in such cases when it said on P. 589:

> "This Court can consider nothing save what is stated in the record sent up from the trial Court."

In *Cave v. District of Columbia*, 90 F. 2d 383, the Court of Appeals for the District of Columbia said on P. 386:

> ". . . We cannot consider matters not in the record; we can review only the case made in and tried in the lower Court."

In *American Trust Co. v. Harris*, 88 F. 2d 541, the Ninth Circuit ruled that matters dehors the record "before it on appeal must be disregarded."

In *Pilger v. Sutherland*, 57 Fed. 2d 604, the Court of Appeals for the District of Columbia had before it certain matters not part of the record of the trial Court. The Court ruled on p. 607:

> "All of this, if true, would be a complete answer to appellant's suit, but we cannot consider these matters on this appeal, since to do so would be to impart into the record something which is not there."

Furthermore, not only is the decision of the Court of Appeals in the present case in conflict with the decisions of other Circuits but is also in conflict with the rulings of the Supreme Court of the United States on this question.

In *Russell v. Southard et al.,* 12 Howard 139, 13 Lawyer's Edition 927, the Court held it had to examine the case "by the light of all the evidence, oral and written, contained in the record." On a motion for rehearing, Chief Justice Taney held that the Court "must affirm or reverse upon the case as it appears in the record" (P. 159, Lawyer's Edition 935). This in our case the Court of Appeals did not do.

To the same effect is *Pennsylvania Co. v. Bender,* 148 U. S. 255, 37 Lawyer's Edition 441. The Court there ruled that an Appellate and reviewing Court is confined to an examination of the proceedings contained in the record of the Court whose judgment is sought to be reviewed—to wit, in the present case the record of the District Court.

In *State of South Carolina v. Edward B. Welsley,* 155 U. S. 542, 39 Lawyer's Edition 254, the Court followed the same principle and refused to entertain matters and parties who were not in the record in the trial Court whose record was being reviewed.

It is obvious therefore that the decision of the Court of Appeals is in conflict not only with the decisions of other Circuits, but also of the Supreme Court of the United States, because the Court of Appeals in the present case erroneously bases its decision upon a document which was never a part of the record of the case in the lower Court before it for review.

Appellants submit that because of this conflict and error certiorari should be granted.

4. Once a notice of appeal is filed, may a District Court enter any order in the same case?

Here the decision in No. 10,120 by the Court of Appeals is again in conflict with the decisions of other Circuits, and with the decision of the same Court of Appeals in its No. 10,015. No certiorari is sought as to No. 10,015. However, it is necessary to explain what occurred in that phase of this case.

On June 8, 1949, the District Court entered an order substituting the Pennsylvania State Secretary of Banking as party plaintiff. On that date an appeal was pending from the order of May 9, 1949, being its No. 10,002. Notice of appeal therefrom had been filed May 25, 1949. The Court of Appeals held that the lower Court had lost jurisdiction of the case when the appeal was taken, and reversed the action of the District Court, citing *Fiske v. Wallace,* 8th Cir., 115 F. 2d 1003, 1005; *Wallick v. Hudspeth,* 10 Cir., 128 F. 2d 343, 344; *Bergeron v. Mansour,* 1 Cir., 152 F. 2d 274.

There is no doubt as to the correctness of the Court's decision in its No. 10,015. Why the same rule does not apply in its No. 10,120 is difficult to conceive.

In its No. 10,120 the Secretary of Banking, Commonwealth of Pennsylvania, as Receiver for Integrity Trust Company on October 26, 1949, filed a motion for revival of judgment. The Court on November 2, 1949, entered an order directing the Clerk to note on the judgment index that the motion of revival of judgment was filed. At that time not only was an appeal pending from the Court's action in No. 10,002—the Order of May 9, 1949, but an appeal had been taken in No. 10,015 from the Order of June 9, 1949. The District Court had clearly lost jurisdiction. Hence it had no right to enter any order.

The Court of Appeals attempts to sustain the lower Court's order on the ground it was just a ministerial act, and not an assumption of jurisdiction. Your petitioners contend that the order was absolutely unnecessary. There is no Federal law dealing with revival of judgments. The Federal Courts have to follow the State law on that subject. In Pennsylvania merely issuing a writ of revival by the Clerk of the Court is sufficient to revive the judgment. By that alone the lien of the judgment is extended for another five years.

The law in Pennsylvania on revivals of judgments is controlled by the Act of July 3, 1947, P. L. 1234, 12 Purdon 878-884. This Act states that the lien of a judgment may

be revived inter alia by the indexing of a writ of scire facias, if such writ is *issued* within five years after the date on which the original judgment or the last preceding judgment of revival was indexed, out of the Court in which the original judgment was entered. The term "issued" has been declared to require only the filing of a praecipe with the clerk, preparation of the writ by the clerk and delivery of it to the plaintiff's attorney, *Luzerne Natl. Bank v. Gosart,* 322 Pa. 446. So in this case all that was necessary to have the judgment revived was to file a motion with the clerk of the District Court, have it noted on the docket and the clerk hand a certified copy of the original to the plaintiff's attorney. An order of the Court was thus entirely unnecessary and superfluous under the circumstances.

However, the action of the Court cannot be passed over lightly according to the cases in other Circuits and following the decision in 10,015, the District Court had no authority so to do, it having lost jurisdiction because two appeals were pending and it was therefore without authority to make such an order.

Furthermore, there is another reason why the Court of Appeals erred in this respect. The motion for revival was filed on behalf of the Secretary of Banking. Now, since the Court of Appeals is number 10,015 found that the Secretary of Banking had not been properly made a party plaintiff, it follows that any motion filed on his behalf was a nullity, and the Court of Appeals erred in not so deciding.

CONCLUSION.

For the foregoing reasons the petitioners submit

1.) The Court of Appeals erred in affirming the Order of May 9, 1949, because no motion for new trial was pending when the Order of May 9, 1949, was granted.

2.) A Judge should not reverse or reconsider matters previously passed upon by a Judge of coordinate jurisdiction, especially during the temporary absence of the Judge who had previously acted.

3.) The decision of the Court of Appeals must be based upon the record of the Court below from which the appeal has been taken, and must not take into consideration any matters not a part of such record.

4.) The motion of revival filed on behalf of one not a proper party is a nullity, and the Court of Appeals should have so found.

5.) The District Court's action in entering an order of the revival was erroneous because it has lost jurisdiction since two appeals were pending at the date of the order.

6.) A petition for certiorari should be granted because of the above errors and because the decision of the Court of Appeals herein conflicts with the decisions of other Circuits and the Supreme Court of the United States.

Respectfully submitted,

A. D. BRUCE,
EDWIN HALL, 2nd,
HARRY J. ALKER, JR.,
Counsel for Petitioners

Office-Supreme Court
FILED
DEC 23
CHARLES

IN THE

Supreme Court of the United States

October Term, 1950.

No. 419.

MAMIE DuBAN, Individually and as Executrix of the Estate of Alfred A. DuBan, Deceased, and HARRY J. ALKER, JR.,

Petitioners, and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION (now to the use of Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company),

Respondent and Appellee Below.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

ALLEN S. OLMSTED, 2ND,
EDWIN C. EMHARDT,
Attorneys for Use-Plaintiff.

International, 236 Chestnut St., Phila. 6, Pa.

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Supreme Court of the United States.

OCTOBER TERM, 1950.

No. 419.

MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED, AND HARRY J. ALKER, JR.,

Petitioners, and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION (NOW TO THE USE OF SECRETARY OF BANKING, COMMONWEALTH OF PENNSYLVANIA, RECEIVER OF INTEGRITY TRUST COMPANY),

Respondent and Appellee Below.

BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit which is sought to be reviewed is reported in 183 F. (2d) 429.

Earlier opinions in the same case are reported at:

151 F. (2d) 907
163 F. (2d) 123
164 F. (2d) 469
169 F. (2d) 336.

JURISDICTION.

Petitioners rely on 28 U. S. Code 1254.

STATEMENT OF THE CASE.

This is the fourth petition for certiorari in this case, and (counting petitions for rehearing), the thirteenth application to this court. All have been denied.

327 U. S. 799
328 U. S. 877
328 U. S. 879
328 U. S. 881
329 U. S. 823
329 U. S. 830
334 U. S. 827
334 U. S. 862
335 U. S. 838
335 U. S. 864
335 U. S. 894
336 U. S. 953

The petitioners' Statement of the Case (which contains no record references) reiterates the averments in previous petitions, including a number of erroneous statements. The actual facts are set out in the opinions of the court below.

The present phase of the case is another effort to open the judgment against Alker which the Court of Appeals has several times refused to do. The disposition of the current petition for certiorari does not require a repetition of all the facts set out in the answers to the three earlier petitions.

Docket 10,002.

On November 8, 1944, Federal Deposit Insurance Corporation entered a judgment against defendant Alker, based on a note he had given to Integrity Trust Company of Philadelphia. This judgment was affirmed by the Circuit Court of Appeals. Alker made many efforts to open the judgment on the basis of alleged after-discovered evidence, the pendency of a bill in Congress and other grounds, all of which were rejected by the Court of Appeals.

On July 30, 1948 the mandate went down from the Court of Appeals to the District Court, which ordered that the prayer "for leave to file a bill in the nature of a bill of review in the court below or to give the court below authority to rehear a motion for a new trial be and same

hereby is denied'' and commanded that proceedings be had in the District Court ''in conformity with the opinion and judgment of this court'' (636a).

On March 3, 1949 District Judge Welsh entered an order for a new trial.

Plaintiff applied to the Court of Appeals for a writ of mandamus to compel obedience to the mandate. Plaintiff also appealed.

In answer to the Rule issued by the Court of Appeals Judge Welsh stated, in effect, that the new trial had been ordered under a misapprehension. He said:

> ''Since the granting of the new trial and the service of citation by your Honorable Court, further study and research have been made of the record and the law applicable, and the Court is of the opinion that the law of this case has been fixed by the Opinions filed and that the repeal of Section 12B(s) of the Federal Reserve Act does not constitute a legislative change which would affect the disposition of the issues heretofore determined. We are, therefore, of the opinion that the Order for new trial should be vacated and that upon the disposition of the present pending appeal therefrom in your Honorable Court our Order should be entered accordingly.''

On May 2, 1949 at the argument in the Court of Appeals on the petition for a writ of Mandamus the Court indicated from the bench that it would issue the writ but desired to give the District Court an opportunity to vacate the order for a new trial.

FDIC, which had appealed from the order granting a new trial (650a) thereupon applied to the District Court for leave to dismiss the appeal (651a) which was granted (9a). At the same time it applied to the District Court for an order vacating the order granting a new trial and dismissing defendant's motions for a new trial (652a).

On May 9, 1949 Judge Kirkpatrick (in the absence of Judge Welsh, who was then in Europe) granted the motion and entered an order dismissing defendant's motions for new trial (658a). This is the order appealed from in number 10,002.

Docket 10,015.

In the meantime the loan of FDIC to Integrity Trust Company had been repaid in full, and the remaining assets, including the Alker judgment, had been transferred to Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company. FDIC on July 28, 1948 moved the District Court to substitute the Secretary for it as party plaintiff (633a).

Such an order of substitution was made on June 14, 1949, after an appeal had been taken in 10,002. This is the order appealed from in 10,015.

Docket 10,120.

On October 26, 1949, plaintiff moved to revive the judgment. The District Court did not act on the motion, but did direct its clerk to note the pendency of the motion on the judgment index. This is the order appealed from in No. 10,120.

The Court of Appeals affirmed in numbers 10,002 and 10,120 and reversed in number 10,015.

After the mandate went down to the District Court, on September 7, 1950, FDIC marked this case to the use of the Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company.

The Receiver thereupon filed four motions in the District Court for the revival of the judgment, examination of the debtor, judgment against a garnishee, and discovery in aid of the latter. All of these are now pending in the District Court.

Thereafter defendant filed this petition for certiorari. This Brief in Opposition is filed by the Receiver, because the FDIC no longer has an interest in the judgment.

ARGUMENT.

The mere statement of the case shows that it presents no question of substance or general importance. Indeed, one doubts that the annals of this Court disclose any other effort to ask this court to review so trivial a matter as a Judge's instruction to his clerk concerning the book in which to index the pendency of a motion; yet this is all that is involved in number 10,120.

The petitioner's suggestion that the Court of Appeals went outside of the record in number 10,002 is without substance. When the Court of Appeals issued its Rule to Show Cause why a writ of mandamus should not issue, the Rule was directed to Judge Welsh and all the other District Court Judges and was lodged in the District Court (646a). Judge Welsh's answer which was made on his own behalf and that of all the judges was lodged in the Court of Appeals. The appellant printed the Rule but not the Answer as part of his appendix on appeal; the appellee printed the Answer as part of his appendix. Both Judge Kirkpatrick and the Court of Appeals took cognizance of Judge Welsh's frank avowal that an error had been made in the matter of granting a new trial; no doubt they would have corrected the error whether or not it had been acknowledged. Clearly neither Court has gone outside the record.

It is submitted that the decision of the Court of Appeals in numbers 10,002 and 10,120 was sound and correct, that the petition for certiorari discloses no questions of substance or general importance, and that this petition should be denied.

ALLEN S. OLMSTED, 2ND,
EDWIN C. EMHARDT,
Attorneys for Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company, Use-Plaintiff.

FILE
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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1950.

No. 419.

MAMIE A. DuBAN, Individually, and as Executrix of the Estate of Alfred A. DuBan, Deceased, and HARRY J. ALLEN, JR.,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

Petitioners' Reply Brief.

A. D. Bruce,
Edwin Hall, 2nd,
Harry J. Allen, Jr.,
Attorneys for Petitioners.

International, 25 Cheapside St., Phila., Pa.

PETITIONERS' REPLY BRIEF.

Respondent at the beginning of its Brief has stressed the fact that certiorari has been sought on several prior instances in this case, the inference being that because certiorari has been refused before, it should be treated lightly and again refused. There is absolutely no basis for that inference. The refusal of certiorari by this Court has been held many times not to necessarily constitute an approval by this Court of the decision of the lower Court. There is real basis for this application and the fact that certiorari heretofore has been refused as to other phases of the case should not influence the Court in connection with the present application. Moreover just because the case has been before the Courts on numerous occasions is no reason for the refusal of certiorari. That this is true is shown by *Klapprott v. U. S.*, 335 U. S. 601 in which the petitioner had been before the Courts on many occasions from 1942 to 1948. It was not until 1948 that certiorari was granted, and when it was granted, the very same Court of Appeals—viz: for the Third Circuit,—as the one to which certiorari is now sought, was reversed. No weight therefore should be given to the inferences raised in Respondent's Brief in this respect.

The Court's attention is further called to the inaccuracy on page 4 of the Respondent's Brief where he states an appeal has been taken from Docket 10,015 of the Court of Appeals. Petitioners in their Brief (page 18) clearly state that no certiorari is sought as to 10,015.

Respondent in its Brief relies entirely upon the Answer filed by Judge Welsh to the Mandamus proceedings. The Court of Appeals in its decision did likewise. *But nowhere in the record certified by the District Court to the Court of Appeals and which was the only record under review by the Court of Appeals, is any reference to this answer to be found. The entire record of the District Court was certi-*

fied by the District Court to the Court of Appeals. The record certified by the District Court was in its Civil Proceeding No. 3047. The writ of mandamus referred to by appellee was filed in the Court of Appeals as of No. 8805, which is not involved in this appeal. The numbers of the proceeding in the Court of Appeals to which certiorari is now sought are 10,002 and 10,120—entirely different from No. 8805. It is thus clear that the mandamus proceedings are not part of the record in the proceedings that were before the Court of Appeals and is now before this Court. The mere fact that Respondent may have attached a copy of the alleged Answer to its paper book before the Court of Appeals did not make it a part of the official record. The District Court certified the entire official record to the Court of Appeals and that is what the Court of Appeals had to consider (Rule 75, Rules of Civil Procedure). Respondent made no objection to the record as certified. The Court of Appeals had no right to rely on something not a part of the record certified to it by the lower Court or to take it into consideration in reviewing the matter then before it.

Practically all the alleged facts set forth on pages 2 and 3 of Appellee's Brief, with the exception of the last paragraph on page 3, are not relevant to this application. They were no part of the District Court record that was being reviewed by the Court of Appeals from whose action this certiorari is requested. They are therefore not relevant and should not be considered by the Court in this application. Respondent has based its entire argument on matters not a part of the record of the District Court which record is all the Court of Appeals must consider on the appeal.

If (assuming just for the purpose of this argument, but not conceding the correctness thereof), it was correct for the Court of Appeals to consider the Answer filed by Judge Welsh in the mandamus proceedings in the Court of Appeals, it would also be proper for the Court of Appeals to consider the fact that Judge Welsh on several occasions

since has stated from the bench that he was of the opinion a new trial should be granted.

The Court's attention is also called to the fact that the record of the District Court before the Court of Appeals at the time of the appeal, did not contain any notation that the matter had been marked to the use of any one. This matter was not marked to the use at the time of or prior to the decision of the Court of Appeals. It, therefore, was not part of the record of the District Court under review to which the Court of Appeals was restricted and beyond which it had no right to go. It, therefore, is no part of this case.

All of Appellee's arguments are statements as to matters not in the record, and your appellants feel that they are only advanced in hope they will befog the issue and confuse your Honorable Court. Appellants feel your Honorable Court will not permit this to happen, but will decide the issues in this case on the basis of the record as certified by the District Court.

There is therefore before the Court a question of substance and of basic and fundamental importance—to wit: whether a court of appeals is not bound to decide a case on the basis of the record as certified to it by the lower Court.

Petitioners submit that a certiorari should be granted in this matter for the additional reasons that not only is there a conflict of circuits on the question as to whether a second judge of coordinate jurisdiction with another judge in a matter has the right to act in the first judge's matter without his consent, but also that the order entered by Judge Kirkpatrick failed to vacate the action of Judge Welsh, merely dismissing all motions for new trial when there was no pending motion for new trial before the Court.

A. D. Bruce,
Edwin Hall, 2nd,
Harry J. Alker, Jr.,
Attorneys for Petitioners.

Office-Supreme Court, U. S.
FILED
JAN 18 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1950.

No. 419.

MAMIE A. DuBAN, Individually, and as Executrix of the Estate of Alfred A. DuBan, Deceased, and HARRY J. ALKER, JR.,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

PETITION FOR REHEARING.

A. D. Bruce,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1950.

No. 419.

MAMIE DuBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED AND HARRY J. ALKER, JR.,

Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent and Appellee Below.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Mamie DuBan, Individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, and Harry J. Alker, Jr., pray that this Court re-hear and reconsider its denial of the petitioners' petition for the issuance of a writ of certiorari to review the decisions of the United States Court of Appeals for the Third Circuit in the above entitled case.

On November 24, 1950, your petitioners filed with your Honorable Court a petition for writ of certiorari to the Court of Appeals of the United States for the Third Circuit.

The Respondent filed its brief in opposition with your Honorable Court on December 28, 1950.

Your petitioners filed their reply brief with your Honorable Court on Saturday, January 6, 1951, shortly before noon.

On Monday, January 8, 1951, between 12 o'clock noon and 1 o'clock P. M., a telegram was received by the petitioners advising that the petition had been denied.

The history of the case, the questions presented, the statutes and law involved, the specifications of errors and the reasons for granting the writ are all set forth in the petition for certiorari and brief in support thereof to which reference is made, and will not be repeated here.

GROUNDS FOR GRANTING THE PETITION.

Your petitioners feel that a serious error has been made by your Honorable Court in so hastily refusing the certiorari, and submit

(1) That the United States Court of Appeals for the Third Circuit has decided an important federal question contrary to those in which the United States Court of Appeals for the Second and Eighth Circuits have decided the same question, and there thus is a conflict of the Circuits on the important question as to whether a second Judge whose jurisdiction is coordinate with that of the first Judge has the right to make an order in a matter which will in effect vacate an order of the first Judge.

(2) That the United States Court of Appeals for the Third Circuit has ratified a decree entered by one Judge of the United States District Court for the Eastern District of Pennsylvania, which decree constitutes an interference by said Judge in a case which was the case of another Judge of the same Court while said other Judge was absent from the country.

(3) That the said decree purported to dismiss all motions for a new trial in the matter, when the record clearly showed that the Trial Judge had granted the motion for new trial, and there was, therefore, no motion for new trial pending; the decree appealed from not stating that it va-

cated any order and thereby only applying to any then pending motions (of which there were none).

(4) That the United States Court of Appeals for the Third Circuit has not based its decision on the record of the District Court before it for review but has based it on matters not appearing in the record, which petitioners contend under the law it had no right to do; the decision thus being in conflict with decisions in like matters by other circuits and contrary to decisions by your Honorable Court. The Court of Appeals has relied in its opinion on an answer filed in the Court of Appeals by the District Court in its number 8805, which is different from the present case numbers to which certiorari is now sought. The attached statement by the clerk of the District Court shows that the answer was never a part of the entire record as certified to the Court of Appeals. This raises a very serious and important federal question. If this decision of the Court of Appeals is permitted to stand, then no Court in the future will be required to decide a case on the record before it, but will be allowed to go into all kinds of matters extraneous to the record.

(5) That attached hereto as "Exhibit A" is a statement by the Clerk of the District Court for the Eastern District of Pennsylvania, to the effect that no answer was filed of record by Judge Welsh in the District Court in Number 3047. It is this record of the District Court that was up for review by the Court of Appeals. It is the same record to which certiorari was sought. This statement establishes beyond doubt that the Court of Appeals in its decision relied upon matters outside the record of the case before it contrary to the principles established many years ago by this Court.

(6) This petition for re-hearing is filed not only because of the above mentioned important and fundamental federal questions involved in this case, but also due to the fact that the petitioners' reply brief was filed with your Honorable Court on Saturday, January 6, 1951, about 11:45 A. M., and on Monday, January 8, 1951, shortly after 1

o'clock, P. M., your petitioners received a telegram from the Clerk of the Court sent from Washington, D. C., bearing time stamp 12:42 P. M., stating that the petition for certiorari had been denied. Your petitioners feel, therefore, that your Honorable Court either did not have sufficient time in which to study carefully the matters set forth in petitioners' reply brief because of the short length of time between the filing of the reply brief and the notice as signed by the Clerk of the Court; or your Honorable Court inadvertently did not see all the papers in the matter at all.

WHEREFORE petitioners pray that your Honorable Court grant a re-hearing in the above matter and that the judgments of the Court of Appeals for the Third Circuit in #10,002 and 10,120 may be reversed.

MAMIE DUBAN,
Individually and as Executrix of the Estate of Alfred A. DuBan, Decd., and

HARRY J. ALKER, JR.,
Petitioners.

A. D. BRUCE,

EDWIN HALL, 2ND,

HARRY J. ALKER, JR.,
Attorneys for Petitioners.

We hereby certify that this petition is presented in good faith and not for delay, and is confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioners although not previously presented.

A. D. BRUCE,

EDWIN HALL, 2ND,

HARRY J. ALKER, JR.,
Attorneys for Petitioners.

CLERK'S OFFICE

DISTRICT COURT UNITED STATES

EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA 7

January 15, 1951.

Harry J. Alker, Jr, Esq.,
1505 Land Title Building,
Phila. 10, Pa.

Dear Mr. Alker:

Replying to your letter of January 15, 1951, re: Federal Deposit Insurance Corp. vs. Harry J. Alker, Jr., et al, Civil Action No. 3047, please be advised that an inspection of the docket does not disclose the filing of an answer by Hon. George A. Welsh to a writ of prohibition and mandamus, or any other answer by him.

Very truly yours,

George Brodbeck

GEORGE BRODBECK,
Clerk.

Exhibit A

COPY BOUND CLOSE IN CENTER